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AMERICA'S CREDIT UNIONS

Sent via e-mail: **regs.comments@federalreserve.gov**

March 12, 2004

Ms. Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, DC 20551

Re: **Docket No**. **R-1176 Comments to Regulation CC Amendments**

Dear Ms. Johnson:

On behalf of the Georgia Credit Union League, I am pleased to submit comments on the proposed rule to amend Regulation CC and its commentary ("Commentary") to implement the Check Clearing for the 21st Century Act (the "Check 21 Act" or "Act") and improve Regulation CC overall. The Georgia Credit Union League is the state credit union trade organization and one of the network of state leagues that make up the Credit Union National Association (CUNA). The Georgia League serves more than 211 credit unions that have over 1.7 million members; nationwide CUNA represents 90 % of the 10,000 credit unions serving 83 million Americans. As the state level trade organization for credit unions in Georgia, we appreciate the opportunity to provide input into this regulatory review process.

GCUL commends the Federal Reserve Board for its thorough vetting of the proposal and the extended comment period it offered on the rule. In addition, GCUL asks that the Federal Reserve Board meet with CUNA regarding the affect of potential Magnetic Ink Character Recognition ("MICR") errors on smaller financial institutions, such as credit unions.

SUMMARY OF GCUL'S POSITION

GCUL strongly supports:

- Treating all substitute checks as the legal equivalent of the original check regardless of whether there is an error in the MICR line on the substitute check because this helps make substitute checks a reliable, negotiable instrument.

- Requiring a reconverting bank to print the MICR information from the original check on every substitute check that it creates. A failure by the reconverting bank to do so should be considered a breach of the Check 21 Act Warranties.

- Ensuring that the reconverting bank, collecting bank and returning bank can repair a MICR line on a substitute check without incurring additional liability under the Check 21 Act, so that they are not discouraged from repairing MICR errors on substitute checks.

- Providing equivalent liability among the first and second reconverting bank, when the first reconverting bank does not provide notice that it is creating a substitute check.

- Eliminating the concept of a "purported substitute check" within section 229.51(c) because it introduces uncertainty into the reliability of substitute checks.

- Including the new definition of "transfer and consideration" in the proposal, which allows a paying financial institution to transfer a substitute check to its members or customers.

- Referring to general industry standards in the regulation and mentioning specific standards in the Commentary. This placement gives the Federal Reserve Board the flexibility to change the standard or add a new standard within the Commentary, which can be more readily changed.

- Incorporating the usage of "banking day" in the proposal, as opposed to "business day" because this would make the timing consistent with the timing in Regulation E.

- Excluding duplicate ACH debit payments that originate from a substitute check from the Check 21 Act warranties. The NACHA Operating Rules provide proper protection for consumers under this scenario.

- Shortening the consumer awareness notice to include only the basic information on substitute checks and expedited recredits, so that it is easier for a consumer to read.

- Including sample notices for the Check 21 Act notice requirements and specifying that the Federal Reserve Board deems usage of these, or substantially similar notices, as compliance with the Act.

- Eliminating the requirement to notify consumers in writing when a claim is valid. In these cases, the consumer will receive a recredit.

- Defining "clear and conspicuous" for notices within Regulation CC, only after the Federal Reserve Board develops a specific definition that undergoes review in the normal comment process.

- Allowing financial institutions, which have not already provided disclosures, to provide a consumer awareness notice with the substitute check.

- Prohibiting returning banks from indorsing on the front of checks and requiring the usage of black ink for indorsements. Reserving the front of the check for the bank of first deposit, make it easier for them to trace teller errors and requiring black ink for indorsements enhances the legibility of indorsements.

- Maintaining the current time frames for notice of nonpayment.

- Clarifying the current rules regarding the extension of the Midnight Deadline.

- Adopting a new Regulation CC warranty regarding unsigned, remotely created items, after the Federal Reserve Board develops a specific warranty that undergoes the rulemaking process.

- Requiring disclosures in Regulation CC to be consistent with the requirements of the Electronic Signatures in Global and National Commerce Act (the E-Sign Act) and adopting language that clarifies the acceptability of e-mail.

- Clarifying the definition of "local bank."

BACKGROUND

The Check 21 Act was signed into law on October 28, 2003, and it will become effective on October 28, 2004. The law is designed to facilitate the electronic exchange of checks by making processing of electronic checks voluntary and not mandatory. The law does not mandate that all financial institutions be willing to accept electronic checks, but all institutions must accept a "substitute check" instead of the original share draft or check. The substitute check is the paper copy of the electronic check file.

The Check 21 Act establishes the law for the creation and exchange of substitute checks. This Act covers all share drafts and checks and makes all of them eligible for conversion, including: consumer and business checks, Treasury checks, official checks, teller's checks and traveler's checks. The proposed regulation on the Check 21 Act would be placed within Regulation CC (Availability of Funds and Collection of Checks) in a new subpart D and would include the requirements of the Check 21 Act that affect financial institutions as they relate to substitute checks or paper or electronic representations of substitute checks. Subpart D will contain the following provisions: the requirements a substitute check must meet to be the legal equivalent of an original check; the duties of the financial institution that converts a check into a substitute check (the reconverting bank); the warranties and indemnities associated with substitute checks; expedited recredit procedures for consumers and banks that suffer a loss due to substitute checks; liability for violations of subpart D; samples of the consumer awareness disclosure and other disclosures regarding substitute checks; and the endorsement and identification standards for substitute checks. The Board also proposes revisions to several other parts of Regulation CC and its Commentary. This letter addresses the changes in the proposal that implement the Check 21 Act and other suggested changes to Regulation CC.

DISCUSSION

Legal Equivalence for Substitute Checks with MICR Errors

GCUL strongly supports treating all substitute checks as the legal equivalent of the original check regardless of whether there is an error in the Magnetic Ink Character Recognition (MICR) line on the substitute check. Currently, the proposal makes certain errors a reason to deny the legal equivalence of some substitute checks. For instance, the proposal states that when there is a failure to correct the amount on the MICR field then that substitute check would remain valid as the legal equivalent of the original. However, when there are errors in the MICR line with regard to the routing and/or transit number, then those substitute checks would not be the legal equivalent of the paper check. By choosing to distinguish among MICR line errors and denying legal equivalence to some items, the proposal introduces new liabilities into the check collection system and will create uncertainty regarding the handling of substitute checks. GCUL believes that even if the MICR line on the substitute check does not accurately represent the MICR line on the original check, the substitute check should still be the legal equivalent of the original check, regardless of whether the error is in the amount field or some other field.

By establishing a clear rule on MICR errors, the Federal Reserve Board would introduce certainty for all parties that routinely process substitute checks, like their electronic or paper counterparts, secure in the knowledge that they are indeed the legal equivalents of the original checks. Credit unions that collect or pay substitute checks and the consumers that receive them should know that they should treat substitute checks as the equivalent of the original check. If a substitute check were not the legal equivalent, then a paying credit union would have no authority to charge its member's account, even if the paying credit union could determine that the substitute check were otherwise properly payable, regardless of the MICR encoding error. Likewise, a collecting credit union would have no authority to repay the substitute check or to present the check to the paying credit union to obtain payment. Similarly, consumers should be able to rely on the substitute check as the legal equivalent of the original check for proof of payment purposes. However, denial of legal equivalence by the proposal defeats a key purpose of the Check 21 Act, which is to introduce the substitute check as a reliable, negotiable instrument.

The final rule should require a reconverting bank to print the MICR information from the original check in MICR ink on every substitute check that it creates. The MICR line from the substitute check should contain all the information from that check. The rule should make clear that if the reconverting bank does not place the entire, correct MICR line on the substitute check, then it has breached the Check 21 Act warranty requirement that it "accurately represents all of the information on the front and back of the original check" as required under Section 5 and Section 4 of the Act.

Encourage MICR Repair on Substitute Checks

GCUL also supports revising the proposal to ensure that the reconverting bank, collecting bank and returning bank can repair a MICR line on a substitute check without incurring additional liability under the Check 21 Act. GCUL also believes that the proposal should encourage collecting and paying financial institutions to treat and repair the MICR lines on substitute checks in the same

manner that they would treat and repair original checks. As a result, the proposal should provide that a collecting credit union or a paying credit union could voluntarily repair any portion of a MICR line on a substitute check that it receives in the check collection process. Although these repairs should be allowed, they should not be mandatory. When a collecting or paying financial institution does repair a substitute check, that repair should not invoke the Check 21 Act warranties, regardless of whether it is done correctly or not or whether the full or partial MICR line is placed on the repaired substitute check. Instead, the collecting or paying financial institution that repairs a substitute check in a manner that results in an inaccurate MICR line would breach the encoding warranties under the Uniform Commercial Code ("UCC") and Regulation CC.

In order to do this, the final rule should clarify that a reconverting bank may repair a MICR line on a substitute check after it creates that substitute check. This repair of a substitute check would involve the addition of a strip to the bottom of the check and the printing of the correct MICR line information on that strip. This would permit a reconverting bank to correct any portion of the MICR line on a substitute check, if the bank realizes, after the creation of the check, that the incorrect MICR line will result in an error in the delivery or processing of the substitute check. Repair of a substitute check by a reconverting bank should not result in a separate breach of the Check 21 Act warranties and should not affect the status of the substitute check as the legal equivalent of the original checks.

To implement this position, GCUL proposes the Commentary text below:

> *Proposed Addition to Commentary*:
>
> Section 229.2(zz); Definition of Substitute Check: (##) A reconverting bank shall encode a substitute check in MICR ink with the MICR line information appearing on the original check, except as provided under generally applicable industry standards. If the MICR line on the substitute check does not accurately represent the MICR line on the original check, the reconverting bank has breached its warranty under Section 5 of the Act. A reconverting bank may repair the MICR line of a substitute check after the creation of the substitute check. An inaccurate MICR line on a substitute check as a result of repair or creation does not affect the status of the substitute check as the legal equivalent of the original check.

Ultimately, if the reconverting bank does not place a MICR line on a substitute check that matches the original check's MICR line, and another credit union or consumer experiences a loss, then the warranties and indemnities under the Check 21 Act as written should and would protect that person. The warranties and indemnities under the Check 21 Act from the reconverting bank will protect subsequent parties to the extent any liability arises from the receipt of a substitute check with MICR line information that does not "accurately represent" the MICR line information on the original check.

GCUL believes that the above proposed treatment of repair by collecting financial institutions and paying financial institutions would encourage equivalent repair treatment of check and substitute checks in the check collection process. The Check 21 Act should not impose additional liabilities for repair of substitute check that would discourage the repair of substitute checks. If the proposal

imposed the Check 21 Act warranties and new liabilities on those institutions that repaired substitute checks, these requirements would discourage financial institutions from repairing substitute checks and would hinder check processing. If all other parties were discouraged from repair, paying credit unions and other paying financial institutions could receive a disproportionate number of substitute checks with bad MICR lines.

To implement this position, GCUL proposes the Commentary text below:

> *Proposed Text For Commentary*:
>
> Section 229.2(zz); Definition of Substitute Check: (##) A bank, other than a reconverting bank, may repair the MICR line on a substitute check. A repair that alters the MICR line of a substitute check such that it does not accurately represent the MICR line of the original check does not result in a breach of a warranty under the Check 21 Act; although it may result in a breach of the encoding warranties prescribed in the Uniform Commercial Code (Article 4-209) and Section 229.34 of this Regulation (see e.g., the Section 229.34(c) encoding warranties). Repair of a substitute check does not affect the status of the substitute check as the legal equivalent of the original check.

Address Inconsistent Liability Among Reconverting Banks

GCUL requests that the Federal Reserve Board revise the proposal, so that there is equivalent liability among the first and second reconverting bank, when the first reconverting bank does not provide notice that it is creating a substitute check. GCUL is aware that the failure of a reconverting bank or a collecting bank to correctly encode position 44 eventually could result in an illegible substitute check further down the collection chain. In one scenario, a subsequent financial institution may create a second substitute check. Without the proper encoding in position 44, this second substitute check could contain a reduced inaccurate image of the original check because the second reconverting bank was not put on notice to preserve the size of the image of the original check. As a result, the first encoding error may leave the second reconverting bank with consequential damages to the consumer for a breach of a Check 21 Act warranty. Unfortunately, the second reconverting bank would not be able to recover these consequential damages from the first reconverting bank because the first institution merely violated the provisions of the Act and not the warranties. The Federal Reserve Board stated that it was not the purpose of the Check 21 Act to disadvantage those that received these substitutes checks. The second reconverting bank should not be penalized for processing a substitute check properly, when the first reconverting bank is at fault. We urge the Federal Reserve Board to specify in its Commentary that the error of the first reconverting bank to properly encode position 44 of the MICR line make it liable for breach of the Check 21 Act warranties under the proposal.

To implement this position, GCUL proposes the Commentary text below:

Proposed Text For Commentary:

Section 229.2(zz); Definition of Substitute Check: (##) A bank that fails to properly encode position 44 on a substitute check, has breached its warranty under Section 5 of the Act.

Eliminate Concept of "Purported Substitute Check"

GCUL requests that the provisions in the Check 21 Act that create the concept of a "purported substitute check" be eliminated from the final proposal. Section 229.51(c) of the proposal provides that if a substitute check meets all the requirements for a substitute check, except for the MICR line requirement, then that check is subject to the warranties and indemnities, but is not the legal equivalent. This section should be deleted. As was discussed earlier, all parties that receive a substitute check should be assured that it is the legal equivalent, and the warranties and indemnities of the Check 21 Act should protect them and all parties that receive these items. In place of this section, the final rule should include the rules discussed earlier regarding the legal equivalency of a substitute check, regardless of whether there is an incorrect or altered MICR line.

Definitions and Standards

GCUL supports the new definition of "transfer and consideration" that is incorporated within the proposal. Section 229.2(bbb) clarifies that a "transfer" includes the transfer of a substitute check from a paying financial institution to its member or customer, and that the Check 21 Act applies to the paying bank's creation and transfer of a substitute check to its customer. We support this new definition as set forth in the proposal, as well as the example in the Commentary of a paying institution creating a substitute check for delivery to its member. GCUL believes that paying financial institutions should have this option to deliver substitute checks to their members or customers.

GCUL believes that the Federal Reserve Board should refer to general industry standards in the regulation and mention specific standards in the Commentary. The Federal Reserve Board requests comments on its proposed treatment of generally applicable industry standards. The Federal Reserve Board proposes that it use the rule to refer to "generally applicable industry standards" and that it use the Commentary to specifically delineate the standard if there is a single one. The Federal Reserve Board opines that if it uses this approach, then it could adapt to changes in industry standard simply by amending the Commentary and that the Federal Reserve Board would not need to change the underlying regulatory requirement that refers to a general standard. GCUL believes that the financial sector should rely on a specific set of standards, so that substitute checks are uniform. The exclusive list of standards should be set in the Commentary, which can be more easily changed than the regulation. This placement gives the Federal Reserve Board the flexibility to change the standard or add a new standard within the Commentary.

Adopt "Banking Day"

GCUL supports the usage of "banking day" in the proposal, as opposed to "business day." The Federal Reserve Board proposes to incorporate into the regulation the term "banking day" as it has for other parts of Regulation CC. Banking day means "that part of any business day on which an office of a bank is open to the public for carrying on substantially all of its banking function." The Federal Reserve Board believes that "banking day" is an appropriate term when referring to the time limits for a bank to provide a recredit and make funds available for a recredit. The Board proposes to require recredit action by a financial institution no later than "the end of the 10th business day after the banking day" on which the consumer submitted a claim. Because the term "banking day" in Regulation CC has the same definition as "business day" in Regulation E, defining all of the Check 21 Act expedited recredit rules in terms of banking days would make them consistent with the recredit timing rules for electronic transfers in Regulation E. GCUL believes the consistent application of consumer recredit rules for all types of payments is fundamental to promoting consumer's understanding of their rights and financial institutions' responsibilities in connection with deposit accounts.

The Proposal Should Apply to the Check 21 Act Substitute Checks and the Check 21 Act Warranties

GCUL supports the exclusion of duplicative ACH debit payments from the Check 21 Act warranties. The Federal Reserve Board requests comments on whether a duplicate debit resulting from an ACH debit created using information from the original check or substitute check results in a violation of the Act's duplicate payment warranty. A second charge to an account resulting from an ACH debit entry initiated using an original or substitute check should not be subject to the warranties under § 229.52(a). The ACH rules already provide that an originating depository financial institution warrants that the ACH debit entry is authorized, and, under ACH rules, may be returned for recredit if a consumer claims it is unauthorized. Therefore, it is unnecessary to subject an originator of an ACH debit entry to a second set of warranties under the Check 21 Act. To eliminate potential confusion over this issue, we recommend the Federal Reserve Board clarify in its rules that an ACH debit entry initiated using information from a check is not an "electronic version" of a check under Regulation CC rules.

GCUL proposes a new amendment to the Commentary to implement this position:

> "Section 229.52(a)(2). A reconverting bank that has presented a substitute check to a paying bank would not be in breach of the warranty under Section 229.52(a)(2) and Section 5(2) of the Act in the event that an electronic fund transfer, such as an ACH debit, is subsequently initiated using information obtained from the original check or the substitute check relating to that original check. An electronic funds transfer does not result in a "payment based on a check" that would cause a breach of this warranty. The customer whose account was inappropriately debited for this electronic fund transfer would have the protection provided under electronic fund transfer law.

Similarly, the expedited recredit provisions of the Check 21 Act should not apply to UCC warranties, as specified in the proposal. Under the Check 21 Act, for a consumer to make a claim the consumer must allege that he or she has a "warranty claim with respect to such a check." It was generally assumed that the warranty claim the Act referred to was a warranty claim found within the Check 21 Act. The Commentary states in Section 229.54(a)(2), however, that a consumer has the right to an expedited recredit claim for a breach of UCC warranties with respect to a substitute check. The expedited recredit rights in the Check 21 Act should be limited to circumstances presented within the Act itself. The purpose of the Check 21 Act was to authorize the creation and use of substitute checks. The Check 21 Act was not intended to alter the manner in which current check law applies to a substitute check or the manner in which financial institutions resolve disputes with their consumers under current check law. Consumers are fully protected from breaches of UCC warranties under the UCC. As a result, GCUL asks that the Federal Reserve Board remove the section of the Commentary in 229.54(a)(2) that expands the Act to process UCC warranties.

Consumer Disclosures

GCUL supports adoption of a model notice that is shorter and easier for consumers to understand. A shorter notice is more in line with the intent of the Act. In fact, Section 12 of the Check 21 Act specifically refers to a "brief notice." The model disclosure currently drafted by the Federal Reserve Board, however, would probably not advance the consumer education goals of the Check 21 Act because the model notice is more than two pages long. Consumers are not likely to read and digest such a lengthy and technical notice. As a result, GCUL requests that the Federal Reserve Board provide a shorter, more meaningful disclosure. Specifically, we recommend an alternative short form that can reference a website or an account agreement. A shorter notice is more likely to be read by consumer, and better fulfills the consumer education goals of the Act.

GCUL recommends the model disclosure text below:

Model Disclosure:

> "You may receive from us in certain cases a substitute check, instead of the original check you wrote, for example, in your account statement, when you request a copy of a paid check, or when checks that you deposited are returned unpaid and charged back against your account. A substitute check is a copy of the original check that is treated the same as the original check for all purposes, including the payment you made. A substitute check is the size of a typical business check, includes an accurate copy of the front and back of the original check, and contains the words: "This is a legal copy of your check. You can use it the same way you would use the original check."
>
> Federal law provides consumer customers with certain rights, including an expedited recredit of the amount of the check (up to $2,500 within 10 days and the remainder no later than 45 days), plus interest for interest bearing accounts, if you incur a loss because you received a substitute check instead of your original check and there is a problem crediting or debiting the amount of the item to or from your account. We may reverse a recredit after our investigation of your claim, if we determine that the substitute check was properly

charged to your account. If you believe you incurred a loss because you received a substitute check, please contact us by [insert bank contact information]. You must contact us within 40 calendar days of the later of (i) your receipt of your monthly statement showing the substitute check being charged to your account, or (ii) the date we made the substitute check available to you. We may in certain cases extend this 40 day time period."

GCUL supports the inclusion in the proposal of sample notices for situations in the Check 21 Act that require notices and requests that the Federal Reserve Board explicitly state that it deems usage of these notices or their substantial equivalents as compliance with the Act. Unlike the consumer awareness notice, the Act does not provide a "safe harbor" to financial institutions that use these other sample notices. Nonetheless, GCUL asks that the Federal Reserve Board specify in its final regulation that the Board considers the proper use of these notices by a financial institution to constitute compliance with the Check 21 Act. The Federal Reserve Board's support of its own notices would provide support for a finding of compliance by a court or alternative forums.

While GCUL generally supports the guidance on sample notices, we do not support the Federal Reserve Board's proposal to require financial institutions to notify consumers in writing when a claim is valid. If the claim is valid, then consumers will receive reimbursement, in light of the recredit. Moreover, although § 229.54(c)(1) of the proposal requires that financial institutions provide consumers notice when it is determined that their claims are valid; the Check 21 Act does not mandate this requirement. The requirement for notification should track Regulation E, which allows oral and written communication within three days.

According to the proposal, unless the bank already has provided the disclosure, a case-by-case disclosure is required when (1) a consumer receives a substitute check in response to his or her specific request for an original check or a copy of a check or (2) a check deposited by a consumer is returned unpaid to the consumer's account in the form of a substitute check. The Board has proposed two alternative rule provisions regarding when a bank must provide the disclosure to a consumer who requests a copy of a check. One alternative tracks the statute and requires a bank to provide the disclosure at the time of the request, but the other alternative requires provision of the disclosures at the time the bank provides the substitute check to the consumer. The Board specifically requests comment on which of these alternatives is preferable.

GCUL requests that the Federal Reserve Board allow financial institutions to provide a consumer awareness notice with the substitute check; however, we encourage the Federal Reserve Board to offer both options to financial institutions. The proposal must allow financial institutions to provide a notice when the substitute check is received and not requested because the financial institution does not know at the time the consumer requests the check whether or not a substitute check was used.

GCUL proposes an amendment to the final rule to implement our position:

Suggested Regulatory Text:

"Section 229.57(b)(2) . . . (i) Requests an original check or a copy of a check and receives a substitute check by or at the time the bank provides such substitute check."

In the proposal, the Federal Reserve Board clarifies that a bank may reverse the interest paid in the recredit, as well as the recredit if the claim is found to be invalid. The Commentary also clarifies that a bank may, when appropriate, reverse any amount that it previously recredited, regardless of whether such amount originally was provided after a determination that a claim was valid or pending the bank's investigation. The Board requests comment on whether additional commentary would be useful and, if so, what specific points should be covered. GCUL supports the Federal Reserve Board's clarification that a financial institution may reverse the interest paid in a recredit transaction. An account holder should not be unjustly enriched from interest paid on a denied claim.

GCUL supports inclusion of more examples that explain the relation of the Check 21 Act to other law. The Commentary at various points attempts to clarify the interaction between the rights and remedies conferred by the Check 21 Act and those conferred by other law, particularly the UCC. The Board specifically requests comment on whether the proposed commentary is adequate with respect to the interaction between the Check 21 Act and existing law or whether commenters believe that additional discussion and examples are needed.

In particular, GCUL notes that the proposal defines a reconverting bank as the first financial institution that receives the substitute check and that transfers, presents, or returns the substitute check in Section 229.2(yy) of the Act. The Federal Reserve Board also allows that financial institution to avoid becoming a reconverting bank, by giving that financial institution the right to refuse a substitute check from a nonbank in the third example of the Commentary to Section 229.2(yy).

The Federal Reserve Board should clarify, in the Commentary, what financial institution becomes the reconverting bank, when a third party processor is used that sends substitute checks to the financial institution without an agreement. This example is necessary to help financial institutions assess when they are incurring the additional liability that is part of assuming the role of a reconverting bank. We recommend that the Federal Reserve Board clarify how a bank that receives a substitute check from a nonbank without its assent can logistically decline the substitute check and therefore prevent itself from involuntarily becoming a reconverting bank.

Indorsement Standards

GCUL supports reservation of the front of the substitute check for indorsements by the bank of first deposit, and GCUL supports the use of black ink for indorsements. The Federal Reserve Board requests comments on what benefits, if any, there would be in providing returning banks with the flexibility to indorse on the front of checks. GCUL supports prohibiting returning banks from indorsing on the front of checks and requiring the usage of black ink for indorsements. Reserving the front of the check for the bank of first deposit, make it easier for them to trace teller errors. In addition, requiring the usage of black ink makes it easier for subsequent financial institutions to read indorsements because indorsement in other colors are frequently harder to see and frequently copy poorly.

Unrelated Regulation CC Amendments

GCUL supports the adoption of a new Regulation CC warranty regarding unsigned, remotely created items, after the Federal Reserve Board drafts a specific warranty and submits it to the rulemaking process. These new warranties would be similar to the warranties recently adopted by the National Conference of Commissioner on Uniform State Law for UCC Articles 3 and 4. The UCC revision defines a remotely created consumer item to mean " an item drawn on a consumer account, which is not created by the payor bank and does not bear a handwritten signature purporting to be the signature of the drawer." The UCC revision would allow a paying bank to use a warranty claim to absolve itself of responsibility for honoring this type of item if a drawer claims it is unauthorized. This revision rests on the premise that monitoring by depositary banks can control this type of fraud more effectively than any practices readily available to paying banks. This new warranty should apply to consumer checks as well as commercial checks, which is broader than the warranty included in the revised UCC. Other improvements on the UCC warranties could be found during a request for comments, so GCUL supports including a similar provision in Regulation CC, after the public has a chance to review the warranties within the context of a proper comment period. GCUL supports the inclusion of a new warranty in Regulation CC, because that allows for national adoption, which would provide much quicker implementation than relying on ratification of the UCC in each state.

GCUL does not support reduction of the time frames for notice of nonpayment. For checks in the amount of $2,500 or more both corporate and retail credit unions indicate that the time frames should remain as they are.

GCUL generally supports requiring the disclosures in Regulation CC to be consistent with the requirements of the Electronic Signatures in Global and National Commerce Act (the E-Sign Act) and supports adopting language that clarifies the acceptability of e-mail. The Board proposes to amend the commentary to §229.13(g) regarding notices of exception holds to clarify that a bank providing such a notice electronically to a consumer must comply with the E-Sign Act. Similarly, the Board proposes to amend the Commentary to § 229.15(a) regarding the general form of notices required by Subpart B to clarify that a bank providing a notice electronically to a consumer must comply with the requirements of the E-Sign Act. The Federal Reserve Board also proposes amending the text of § 229.33(b) – the requirement that the paying bank quickly send notice of nonpayment of an item of $2,500 or more to the bank of first deposit. The Federal Reserve Board proposes to state that a financial institution must "send or give" the consumer notice regarding receipt of a returned check or notice or nonpayment. GCUL asks that the Federal Reserve Board use the word "provide" instead of "give." This change is more inclusive of email notification, which may or may not be opened by a consumer. This terminology would also clarify that the notice need not be in writing.

GCUL supports the concept of defining "clear and conspicuous," for purposes of notices under Regulation CC, after the Federal Reserve Board develops a specific proposal that undergoes review in a normal comment process. This proposal is not part of the Check 21 Act, and therefore is not subject to the time restrictions of Check 21. As a result, the Federal Reserve Board should present the public with the specific language, so that organizations can provide meaningful comments, before this language is implemented.

In addition, GCUL supports the Federal Reserve Board's proposal to allow more flexible usage of notices. The Board proposes adding a sentence to the commentary to § 229.10 (c) to clarify that a special deposit slip notice need not be posted at each teller window, although it must be posted in a place where consumers are likely to see it before making a deposit.

GCUL supports the Federal Reserve Board's proposal to define "local bank" more clearly. Regulation CC distinguishes between local and nonlocal items in terms of the deadlines for funds availability. To clarify how an item is considered, the Federal Reserve Board proposes to amend the commentary for the definition of "local paying bank" (12 CFR § 229.2(s)) to provide additional detail on how to determine when deposits mailed to a central check processing facility are local or nonlocal.

GCUL supports the Federal Reserve Board's proposal to clarify the current rule regarding extension of the Midnight Deadline. The UCC requires the payor bank that wishes to dishonor a check to dispatch it either to the depository bank or to a returning bank for forwarding to the depositary bank by midnight on the next banking day after the banking day on which the payor bank had received the check; and failure to make the deadline requires the payor bank to pay the check. The current rule allows extension of up to one day when a paying financial institution uses a means of delivery that ordinarily would result in receipt of the check by the receiving bank's next "banking day." In a recent court case, the court interpreted the current provision to permit an extension of the Midnight Deadline even when a returning bank received the check at a time that was too late for the bank to process the check that day. In effect, the court found that a Federal Reserve Bank, the returning bank in this case, has no end to its "banking day" and thus allowed a return up until midnight of the day following the Midnight Deadline. The proposed amendment to Regulation CC would effectively overrule this decision and make it clear that the check must be received by the returning bank's cutoff hour for the next check-processing cycle (if sent to a returning bank). GCUL supports this change because most credit unions adhere to the Midnight Deadline and clarifying the deadline for the extension protects credit unions.

Conclusion

GCUL commends the Federal Reserve Board for providing an extended public comment period on this proposal to amend Regulation CC. GCUL has provided comments on the parts of the proposal related to Check 21. Certain amendments, unrelated to Check 21, have not been described with enough detail to allow meaningful comments. The Federal Reserve should develop specific proposals on these matters and provide the public with a chance to comment on specific, fully developed proposals. If you have any further questions, please contact me at the below address.
Sincerely,

Cynthia A. Connelly
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